92-1580

NO.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

COATS COMPANY,

Petitioner,

v.

SCOTT CANTRELL,

Respondent.

Petition for Writ of Certiorari to the Court of Appeals for the Twelfth District of Texas at Tyler

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner's right to due process of law was abridged when a Texas appellate court ignored the requirement of fundamental fairness implicit in the 14th Amendment Clause of the United States Constitution and developed through United States Supreme Court decisions.

II. Whether Petitioner's right to due process of law was abridged when a Texas appellate court transgressed the Texas Constitution, the Texas Government Code and the Texas rules of Appellate Procedure because only one justice participated in the decision, resulting in a clear, palpable violation of Petitioner's constitutional right that Petitioner cannot be deprived of property without due process of law as established by the United States Constitution.

LIST OF PARTIES

In the Application for Writ of Error in the supreme court of Texas, The Coats Company, a division of Hennessy Industries, Inc., a subsidiary of Danaher Corporation was the petitioner, and Scott Cantrell was the respondent.

In the proceeding in the Court of Appeals for the Twelfth Court of Appeals District in Tyler, Texas, The Coats Company was the respondent-appellee and Scott Cantrell was the petitioner-appellant.

In the trial court, The Coats Company, was the defendant, and Scott Cantrell was the plaintiff.

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PETITION FOR WRIT OF CERTIORARI

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The petitioner, The Coats Company, a division of Hennessy Industries, Inc., a subsidiary of Danaher Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the court of appeals for the Twelfth District of Texas at Tyler entered in this proceeding on March 31, 1992.

OPINIONS BELOW

The opinion of the court of appeals for the Twelfth District of Texas at Tyler which reversed and remanded the take nothing judgment against Cantrell, plaintiff in the case below, is reported at 829 S.W.2d 875 (Tex. App.–Tyler 1992) and appears as Appendix A to this petition. The findings of the jury and subsequent judgment of the trial court are unreported.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals for the Twelfth District of Texas at Tyler was entered on March 31, 1992. A Motion for Rehearing in the court of appeals was denied in June 18, 1992. An Application for Writ of Error to the supreme court of Texas was denied on October 21, 1992. The Motion for Rehearing in the supreme court of Texas was denied on December 2, 1992. This Application for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

UNITED STATES CONSTITUTION PROVISION INVOLVED

Amendment XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEXAS CONSTITUTION PROVISION INVOLVED

Texas Constitution, Article V, § 6.

The state shall be divided into courts of appeals districts, with each district having a Chief Justice, two or more other Justices, and such other officials as may be provided by law. The Justices shall have the qualifications prescribed for Justices of the supreme court. The court of appeals may sit in sections as authorized by law. The concurrence of a majority of the judges sitting in a

section is necessary to decide a case. Said court of appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error. Said courts shall have such other jurisdiction, original and appellate, as may be prescribed by law.

STATUTORY PROVISION INVOLVED

Texas Government Code, § 22.216(l)

The Court of Appeals for the Twelfth Court of Appeals District consists of a chief justice and two justices.

Texas Government Code, § 22.222(a):

Each court of appeals may sit in panels of not fewer than three justices for the purpose of hearing cases.

Texas Government Code, § 22.222(c):

A majority of a panel constitutes a quorum for the transaction of business, and the occurrence of a majority of a panel is necessary for a decision.

Texas Rules of Appellate Procedure, rule 90(b):

Signing of Opinions. A majority of the justices participating in the decision of the case shall determine whether the opinion shall be signed by a justice or issued per curiam. the names of the justices participating in the decision shall be noted on all written opinions or orders handed down by a panel.

STATEMENT OF THE CASE

I. Federal Question Timely and Properly Raised

Coats prevailed at the trial court level. On appeal the case was reversed in favor of Cantrell and remanded for a new trial. As the prevailing party, Coats had no basis to raise either a constitutional or federal question in the briefs filed in the appellate court.

Coats made Application for Writ of Error to the Texas Supreme Court. That Writ of Error was denied. In the Application for Writ of Error to the Texas Supreme Court Coats asserted:

> "this unprecedented holding represents a significant change in the law of this state applicable to "discovery" of similar products, places an undue burden on a defendant, and requires the production of documents that would not and could not have made any difference in the final outcome. In addition, in order to reach its decision to misconstrue the holding in *Jampole* v. *Touchy*, the court of appeals completely and wholly ignored long standing case decisions of this Court, the appellate courts, as well as procedural rules regarding the preservation of the record for appellate review".

Petitioner's Application for Writ of Error to the Supreme Court of Texas at page 3 (July 20, 1992).

The record as a whole showed by clear intendment that a constitutional or federal question regarding due process was raised in that the court of appeals either totally ignored the record or failed to read the trial record. This inaction resulted in the

rendition of an arbitrary, capricious and unfair judicial determination which has required and will continue to require Coats to expend enormous sums of money and effort in a retrial, thereby depriving Coats of a significant property interest. The constitutional or federal question was raised again in Coats' Motion for Rehearing to the Texas Supreme Court. The Motion for Rehearing was denied.

This court has stated that no particular form of words or phrases is necessary to raise a federal question. *Green Bay, & M. Canal Co. v. Patten Paper Co.*, 172 U.S. 58 (1898). If the record as a whole showed by clear intendment that a constitutional or federal question was raised, it has been adequately presented. *Street v. New York*, 394 U.S. 576 (1969). Coats' assertion of undue burden raised a constitutional or federal question which was preserved.

In the alternative, Coats urges that if this Court concludes that the state court's decision rests on an independent nonfederal ground, the nonfederal ground is without any fair or substantial support. In *National Asso. for Advancement of Colored People v. State of Alabama, ex rel. Patterson*, 357 U.S. 449, 455 (1958) this Court re-emphasized that its jurisdiction is not defeated if the nonfederal ground relied on by the state court is "without any fair or substantial support."

It then becomes this Court's duty to ascertain, in order that constitutional guarantees may appropriately be enforced, whether the asserted nonfederal ground independently and adequately supports the judgment and/or if the judgment of the appellate court is without any fair or substantive support.

For these reasons the decision of the court of appeals and the Texas Supreme Court are reviewable by this Court.

II. Proceedings Below

This lawsuit was originally filed by Cantrell against Coats and Kelly Springfield Tire Company (hereinafter referred to as "Kelly") on December 10, 1987 in the 62nd Judicial District Court for Hopkins County, Texas. Cantrell sought to recover damages against Coats and Kelly for injuries sustained as a result of a tire explosion which occurred while he was using a Coats' 40.40A tire changer to mount, bead seat, and inflate an old tire onto a highly rusted and corroded rim. Cantrell alleged that Coats' was negligent and strictly liability for the manufacture, design, and sale of the tire changer and such was the proximate cause and/or producing cause of his injuries and damages. Coats denied liability for claims asserted by Cantrell. Kelly was non-suited by Cantrell on March 8, 1989 following discovery. Prior to trial, extensive discovery was undertaken and completed by all parties.

The case was tried before a jury of twelve (12) Hopkins County citizens commencing on May 9, 1989, through May 17, 1989. The jury returned a verdict against Cantrell and in favor of Coats on May 17, 1989. [See Appendix H]. On June 15, 1989, the Court entered a take nothing judgment against Cantrell based on the jury's verdict. [See Appendix I].

Cantrell appealed the trial court's judgment. On March 20, 1992, the court of appeals entered an opinion and judgment reversing the trial court's judgment in favor of Coats signed only by Justice Bill Bass. [See Appendices A and B, respectively]. The court of appeals remanded the case to the trial court for a new trial. On April 16, 1992, Coats filed a Motion for Rehearing, asserting that the court of appeals erred in reversing and remanding the case to the trial court. On June 18, 1992, the clerk of the court of appeals notified counsel of record that the Motion for Rehearing had been overruled presumably bh Justice Bill Bass on June 18, 1992. [See Appendix C].

Coats submitted an Application for Writ of Error to the Texas Supreme Court which was denied. [See Appendix D]. Thereafter, a timely filed Motion for Rehearing was denied on December 2, 1992. [See Appendix E].

III. Material Facts

The dispute presented centers upon a legally correct and appropriate discretionary discovery ruling by the trial court judge and the failure of the Texas appellate court to follow well established procedural rules regarding the consideration of and the rendition of appellate decisions.

During the course of discovery more than twenty-five (25) depositions were taken of fact witnesses, expert witnesses, and Coats' personnel. In addition, Coats produced a large volume of written documentation as well as other information related to its efforts to develop safety devices to control the flow of air during the mounting, seating, and inflating of vehicular tires.

As this case moved closer to trial, Coats filed a motion for protective order which was legally sufficient and supported by appropriate affidavits, and made an offer for an *in camera* inspection of documents. The motion for protective order raised a number of grounds of objections to discovery, including undue burden, harassment, lack of relevance, and various privileges. Cantrell was not prohibited from obtaining any discovery. The protective order merely set forth the specific categories of items that Coats was required to produce. The trial court, following submission of written memoranda and hearing oral argument of the parties, duly and thoughtfully considered the motion for protective order and thereafter entered a protective order. This order was entered thirty-two (32) days prior to the discovery cutoff and two (2) months prior to trial. The motion for protective order and the trial court's order are attached to this Petition as Appendix F and Appendix G, respectively. This action by the court came following over fifteen (15) months of active pretrial

discovery. The discovery record reflected that a number of different safety mechanisms were developed, tested, and even patented by Coats. Although many safety devices were considered, there was no evidence that Coats ever marketed any of its tire changers prior to 1983 with a device to reduce air pressure. The discovery record further indicated that Coats utilized and relied upon a written warning regarding over-inflation of tires for the safety of the operators.

In 1987, four (4) years after the manufacture of the machine in question, Coats commenced development of a device known as a pneumatic inflator. This device functioned by periodically monitoring internal tire pressure while allowing full pressure flow to the tire and then cutting off inflation when the tire reached a present maximum pressure.

After the initial development of the pneumatic inflator, further modifications were made and the device was field tested to insure that it was both mechanically reliable and commercially feasible. At the time of the trial, the pneumatic inflator was in the final stages of development and had not yet been produced for the marketplace in a model similar to the 40.40A. The pneumatic inflator was in fact patented within days of the commencement of the trial.

The court of appeals' opinion purportedly relies upon *Jampole v. Touche*, 673 S.W.2d 569 (Tex. 1984). The *Jampole* decision requires the production of safety devices where there exists other similar models in addition to the model at issue. *Jampole* has no application in this case because there were no similar models, Coats had never marketed any of its 40.40A type models with safety devices. and all other predecessor models were marketed without safety devices. Essentially, there was nothing for Coats to produce. Evidence of safety devices tested and considered generally by Coats were replete within the record.

The crux of the issue before the Texas appellate court was whether or not Cantrell is entitled to a new trial because Coats sought protection from excessive discovery requests and its motion for protective order was granted by the trial court after a full airing of all issues and in its inherent discretion.

Cantrell complains that the trial court's order precluded the discovery of other safety devices applicable to predecessor models. What Cantrell failed to disclose in his appeal, and the court of appeals failed to glean from the record, was that Coats did not market any of its 40.40A predecessor models with safety devices. In addition, although Cantrell acknowledged in his appeal the presence of such evidence of alternative safety devices at trial, the court of appeals overlooked the portion of the record where substantial evidence of safety devices which had been considered and tested, though not marketed, was made available during discovery and such devices were in fact, the subject of plaintiff's case in chief.

The trial was long, hard-fought, and fair to both parties. The jury in this case had the full benefit of the evidence that Coats had tested safety devices, had marketed the 40.40A and its precedessors without safety devices, and that from time to time tire explosions occurred from overinflation. Despite the potential prejudice created by such evidence, the jury declined to find Coats negligent, grossly negligent, or strictly liable. Additional evidence would have been cumulative and would not have changed the outcome.

In considering its verdict, the jury had available to it evidence of the total number of accidents which had occurred on all Coats' tire changers from approximately 1972 to 1989, evidence of a variety of safety devices considered by Coats' witnesses or proposed by the plaintiff's experts, as well as the testimony from Cantrell's own expert witness that the Coats' predecessor model tire changer that he owned, and used in testing, without any safety device to control the fow of air, was not defective. Despite

the presence of such evidence, the jury, nonetheless, found in favor of Coats and against Cantrell.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Special and important reasons justify the granting of the writ. The court of appeals has severely departed from the accepted and usual course of proceedings. Because of this, Coats asserts a violation of its property interest that is encompassed within the protection of the 14th Amendment. Coats has been deprived of property without due process of law by the decision of the Texas court of appeals [hereinafter "court of appeals" or "appellate court"].

A careful consideration of the following arguments will show that the court of appeals' decision is an unfair, arbitrary, and capricious judicial determination without any fair or substantive support. Furthermore, the decision was rendered through a procedure in violation of Texas law, which has cast shadows on the fairness, integrity and reputation of public judicial proceedings.

I.

IN CONFLICT WITH THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT AND UNITED STATES SUPREME COURT DECISIONS, THE BASIS OF THE COURT OF APPEALS' DECISION IGNORES THE REQUIREMENT OF FUNDAMENTAL FAIRNESS.

The court of appeals' decision in the instant case ignores the concept of due process of law that has been applied to the states through the 14th Amendment of the United States Constitution. The language of the opinion clearly suggests that the court either failed to read the record or ignored it. Further, the court of appeals relied in its decision upon a general principle of law that was factually inapplicable to this case.

These fundamental errors resulted in a substitution of the judgment of a single appellate justice, contrary to Texas law, for the judgment and for the discretion of the trial court and the decision of the jury. If the appellate court's decision is permitted to stand, then Coats must retry the case at enormous expense over an issue that had no effect on the jury verdict, and was harmless error, at best.

Due process represents the idea of fundamental fairness, the denial of which is shocking to the sense of justice. *Kinsella v. United States*, 361 U.S. 234 (1960). The fundamental concept of due process of law calls for such procedural protections as a particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471 (1972). In *Boddie v. State of Connecticut*, 401 U.S. 371 (1971) this Court explained due process by stating that a state's obligations are not simply generalized ones; rather the state owes to each individual that process of law which in light of values of a free society can be characterized as due.

In 1943, this Court explained that due process in a procedure affecting property interests must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceeding appropriate to the nature of the case. *Anderson National Bank v. Luckett*, 321 U.S. 233 (1943). Using *Anderson* as a benchmark for procedural acceptability, the court of appeals' decision fails for lack of due process. No reasonable person can dispute the purpose of the procedure, or that the effect has been a taking of Coats' property; however, the denial of due process of law becomes evident when the circumstances affecting the proceeding are scrutinized.

In the trial court, Coats obtained a take nothing judgment. The appellate court reversed and remanded the case for a new trial because it found that the trial court abused its discretion in too narrowly restricting discovery. It is hard to conceive why the appellate court, with the benefit of an extensive record at hand,

could find that the trial court's pre-trial order constituted such a limitation of discovery and such an abuse of discretion as to result in a denial of Cantrell's rights; and that such an order was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the trial court, now requiring a new trial.

A cursory review of the record by the appellate court would have shown that Cantrell, in fact, enjoyed a wide latitude in the depth and breadth of discovery. The pre-trial order, which purportedly constituted the abuse of discretion, did nothing to limit the scope of discovery in this case. This pre-trial order actually compelled Coats to produce certain itemized categories of documents and things. The pre-trial order that Cantrell complained about specifically required Coats to produce:

> "(1) a prototype of both the pneumatic inflator and a computerized inflation device being developed by Coats; (2) the patent applications for the pneumatic inflator and the computer inflator; and (3) the name of the supplier and the cost of the safety devices used on the pneumatic inflator and the computer inflator."

This same order also required Coats to produce:

> " all parts lists, supplier lists, cost lists, claim files, expert reports, and the depositions of expert witnesses pertaining to 40.40A's manufactured from 1978, the time of their introduction, through 1983, the year in which the machine being used by Cantrell was manufactured."

A basic understanding by the appellate court of the trial court's order was essential to rendering an appropriate decision. Equally important was an understanding that: (1) the order did not contain any express limitations of discovery, (2) the order required production of documents and things, and (3) the order was entered on the eve of both the discovery cutoff date and the trial date.

Cantrell complained on appeal that he did not receive certain information regarding other safety devices applicable to other models. The appellate court focused on this complaint and agreed. However the record clearly showed: (1) that no safety devices were marketed with any of the predecessor models to the 40.40A; (2) that substantial evidence of safety devices considered and tested, but not marketed in this model or its predecessors had been presented; (3) that these safety devices were made available during discovery; and (4) that these safety devices were the subject of Cantrell's case in chief and the testimony of Cantrell's expert witness. The record specifically reflected that Cantrell had received the requested information pertaining to other alternatives prior to the entry of the trial court's order, to wit:

> a. A detailed history of safety devices or alternatives considered by Coats from the mid 1970s to the present;
>
> b. A definitive statement by Coats that as a practical matter, none of them (pressure limiting devices) were ever found to be effective;
>
> c. A definitive statement by Coats that efforts to develop an effective safety device were ongoing;
>
> d. A definitive statement by Coats that the pneumatic inflator was not available in 1987;

> e. A detailed statement by Coats as to its approach to safety measures to lessen the risk of a person being seriously injured due to an exploding tire on one of its machines. Essentially the use of safety measures in the form of pressure limiters has never been [Coats'] approach at all.

The appellate court relied on only one case, *Jampole v. Touchy*, 673 S.W.2d 569 (Tex. 1984), for its analysis. In *Jampole*, the trial court limited discovery of safety devices to one particular make and model. The Texas Supreme Court held that a production of safety devices is required of similar models when requested; however, unlike the situation in *Jampole* no similar models existed that were marketed with safety devices. All other models were predecessor models marketed without safety devices. The pre-trial order did nothing to preclude Cantrell from obtaining discovery of alternative safety devices. In fact, it specifically required the production of documents pertaining to two alternative safety devices, the pneumatic inflator and the compuuter inflator.

The record clearly shows abundant evidence was introduced at trial by Cantrell regarding safety devices that were tested and considered by Coats and those proposed as alternatives by his expert witnesses. Even Cantrell acknowledged evidence of alternative safety devices was introduced at trial without regard to whether such evidence pertained specifically to the 40.40A. The introduction of such evidence at trial completely contradicts Cantrell's contentions on appeal that the trial court's pretrial order limited discovery to the 40.40A.

The appellate court erred in its decision by its apparent reliance upon documents attached to Cantrell's motion for new trial that were not competent evidence, in direct contravention to well-established Texas law. These documents had not been properly before the trial court and had not been properly

preserved for appeal. Therefore, the court of appeals could not consider them in its review. Texas law mandates that documents not offered at trial nor included in a bill of exception do not constitute part of the record for appeal. *See, Zodiac Corp. v. General Electric Credit Corp.*, 566 S.W.2d 341, 347 (Tex. Civ. App.-Tyler 1978, no writ); *see also Johnson v. Li*, 762 S.W.2d 307, 308-310 (Tex. App.-Ft. Worth 1988, writ denied) (depositions not introduced at trial or presented on a bill of exception cannot be considered on appeal); *Giles v. Cardenas*, 697 S.W.2d 422, 426-427 (Tex. App.-San Antonio 1985, writ ref'd n.r.e.) (testimony not presented at trial cannot be considered on appeal); *Bibby v. Preston*, 555 S.W.2d 898, 902 (Tex. Civ. App.-Tyler 1977, no writ) (deed attached as exhibit to appellate record cannot be considered on appeal); *Nixon v. Royal Coach Inn of Houston*, 464 S.W.2d 900, 901 (Tex. Civ. App.-Houston [14th Dist.] 1971, no writ) (appendix included with appellate brief does not constitute part of the record on appeal).

The short published opinion of the appellate court clearly illustrates a violation of Coats' right to due process of law. The appellate court committed fundamental error by ignoring the trial record, substituting its judgment for the discretion of the trial judge on discovery issues, substituting its judgment for that of the fact finder, and relying upon legal authority which was factually inapplicable.

The appellate court's action was inappropriate to the nature of the case and in direct conflict with *Anderson*. The procedure followed by the appellate court substantially affected the fairness, integrity and reputation of the public judicial proceeding. The judgment of the court of appeals, based on these inappropriate procedures, should not be permitted to stand.

II.

IN DIRECT CONFLICT WITH THE TEXAS CONSTITUTION, THE TEXAS GOVERNMENT CODE, AND THE TEXAS RULES OF APPELLATE PROCEDURE, THE RECORD REFLECTS THAT ONLY ONE JUSTICE OF THE COURT OF APPEALS PARTICIPATED IN THE DECISION TO REVERSE AND REMAND THE JUDGMENT OF THE TRIAL COURT THEREBY ABRIDGING COATS' CONSTITUTIONAL RIGHT TO DUE PROCESS.

This Court has established guidelines for determining whether Coats' right to due process of law was abridged. This Court explained the detailed standards that govern a citizen's due process of law as follows:

> "Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Matthews v. Eldridge, 424 U.S. 319 (1976).

The specific dictates of due process call for a consideration of all three distinct factors. The private interest affected by the official action is readily ascertainable, as Coats has been and will continue to be deprived of property, by expending considerable sums of money to protect its interest.

Regarding the procedures used. The Texas Government Code requires that the twelfth court of appeals district be comprised of three (3) justices: a chief justice, and two (2) associate justices. Tex. Gov't. Code § 22.216(l). Safeguards are mandated by the

Texas Constitution and the Texas Government Code, requiring a concurrence of the majority of the justices for a legally valid decision. Tex. Const. art. V, § 6; Tex. Gov't Code, § 22.222(c). The rules governing Texas appellate procedure require all justices who participate in the decision to be noted on all written opinions or orders. Tex.R.App.P.Ann. r. 90(b) (Vernon 1992).

In the instant case only one justice of the appellate court was noted as participating in the decision. [See Appendices A and B]. However, this notation, indicating only a single appellate justice participated in the decision, clearly violates the Texas Constitution and the Texas Government Code.

A review of written and published decisions by this appellate court reflects a pattern of this violation. In 1992 these three elected appellate justices rendered approximately forty-two (42) written decisions. [See Appendix J]. Five of the forty-two decisions were *per curiam*. On thirty-five of the remaining thirty-seven cases only one single appaellate justice was noted as participating in the decision. Interestingly in the other two cases Chief Justice Ramey and Justice Bass and Colley all participated and so noted the opinion as required by Rule 90(b) of the Texas Rules of Appellate Procedure. The Coats' decision was one of these thirty-five cases.

Adherence to Texas law would not have added any extra burden to the appellate court. The Texas Constitution and the Texas legislature provide procedural safeguards to assure the public that decisions will be rendered by a majority of the justices setting through a fair and rational procedure lending integrity and credibility to the judicial system. The appellate decision a single justice is a violation by this court of appeals which greatly increased Coats' risk of an erroneous decision and the resulting deprivation of its property interest.

To paraphrase the court of appeals, "the failure to have a majority of the appellate court justices decide this case was

calculated to and in reasonable probability did result in an erroneous and legally insupportable decision." [See Appendix A]. The court of appeals' decision violates the property rights of Coats resulting in a denial of due process.

CONCLUSION

The Texas supreme court's denial of the Application for Writ of Error and the Motion for Rehearing allows the appellate court decision to pave the way for other courts to ignore fundamental principles of this Court and the concept of fundamental fairness in judicial proceedings. The court of appeals' decision sets a precedent that if a plaintiff loses, the appellate court is free to ignore the record, disregard legislative requirements, and otherwise search out reasons and ways to allow him to be heard again. Such methodology is grossly unfair to defendants such as Coats.

The decision of the court of appeals can only be characterized as arbitrary, capricious, erroneous, and void of any due process of law.

The decision is also in direct conflict with the fundamental principles established in our system of jurisprudence by the United States Constitution and decisions of this Court for the protection and enforcement of private rights. The decision of the court of appeals has not only deprived Coats of the right to due process of law, but has adversely affected the fairness, integrity and reputation of the Texas judiciary. The language of the opinion shows clearly that the decision was made without a review of the record, and without the requisite number of justices required by Texas law. Consequently, the decision was the product of a capricious exercise of power by a single appellate justice in violation of the Texas Constitution and the Texas Government Code.

Cantrell and Coats fought a fair, tough, and evenly matched battle in the trial court. The trial judge exercised appropriate legal discretion and followed the relevant legal concepts governing discovery. The trial judge correctly entered his discovery order. The court of appeals abridged Coats' right to due process by reversing the trial court.

This Court now has the opportunity to align the opinion of the court of appeals with its decisions, and to require adherence to procedural safeguards utilized in judicial administration to assure the fundamental fairness concept implicit in the due process clause of the 14th Amendment.

A writ of certiorari should issue to review the judgment and opinion of the court of appeals.

Dated this 1st day of March, 1993.

Respectfully submitted,

JEFFREY S. LYNCH
Counsel of Record
LYNCH & ABRAHAM
One Bent Tree Tower,
Suite 320
Dallas, Texas 75248
(214) 713-7070

Attorney for Petitioner

APPENDIX

NO. 12-89-00251-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

SCOTT CANTRELL,	§	APPEAL FROM THE
	§	
APPELLANT	§	
	§	
v.	§	62ND JUDICIAL
	§	DISTRICT COURT
	§	
HENNESSY INDUSTRIES,	§	
INC. AND THE	§	
COATS COMPANY,	§	HOPKINS COUNTY,
	§	TEXAS
APPELLEES	§	

Cantrell appeals the judgment against him in his product liability suit. Cantrell was injured when an automobile tire exploded in his face while changing the tire on a machine manufactured by the Coats Company. Because we find the

Nineteen year-old Scott Cantrell had been working at the W.G. Tire Center in Sulphur Springs for four weeks when the accident took place. He was in the process of mounting a tire using Coats' 40.40A pneumatic tire-changing machine when, apparently, the tire was inflated with too much air pressure while the bottom bead of the tire was not in place. The exploding tire and rim left Cantrell blind and permanently disfigured.

Cantrell brought suit against the Coats Company (hereinafter "Coats") and its parent company, Hennessy Industries, Inc., under the theories of strict product liability and negligence. The jury did not find the machine to be defective, nor did they find Coats to be negligent in the design of the 40.40A. The jury did find Cantrell to be negligent in the operation of the machine. Accordingly, the trial court entered a take-nothing judgment against Cantrell.

A Coats tire-changing machine serves several functions. It can be used to take a tire off a rim, put a replacement tire on

a rim, or seat the beads and inflate a replacement tire using its inflation system with air supplied by the operator's air compressor. Coats had manufactured many generations of the same design prior to making the 40.40A. The company also manufactured a different design referred to as the European-style tire changer. All designs manufactured by Coats used basically the same inflation system. At issue at trial was the safety of the inflation system employed by the 40.40A.

The Coats tire-changing machine relies on air supplied by the air compressor in a service station, which usually supplies up to 180 p.s.i. of air pressure. Bead seating only requires approximately 60 p.s.i. Cantrell's theory was that the 40.40A was unreasonably dangerous or defective because the machine allowed excessive air pressure to the tire during bead seating. He contends that Coats failed to equip the machine with a pressure-limiting device that would have restricted the amount of air pressure to safe levels.

Cantrell argued that a pressure-limiting device was technically feasible and available years before 1983, the year the 40.40A in question was manufactured. The trial court, ruling on discovery objections by Coats, limited discovery to documents regarding the 40.40A machine manufactured between 1978 and 1983. The court repeatedly excluded evidence at trial of pressure-limiting devices used on other Coats tire-changing machines. Cantrell maintains that the trial court abused its discretion in limiting discovery to the 40.40A only, causing the rendition of an improper judgment in the case. We agree.

A matter is discoverable if it is relevant to the subject matter of the action; that is, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Tex. R. Civ. P. 166b(2)(a). Such a broad grant is intended to increase the likelihood that all relevant evidence will be disclosed and brought before the trier of fact. *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984). In *Jampole*, the

trial court limited discovery to knowledge and information pertaining to 1971-77 Chevrolet Vegas in a product liability suit against General Motors. The plaintiff had sought to discover impact tests for other General Motors vehicles built between 1967 and 1979, including GM models manufactured by a foreign subsidiary. The Texas Supreme Court held that the trial court took an unduly restrictive view of the degree of similarity necessary for matters concerning other vehicles to be relevant. "The automobiles need not be identical in order for tests on one to be relevant in determining whether the design of another is defective." *Id.* at 573-74. Furthermore, courts must determine whether a product is defectively designed in relation to safer alternatives. Whether a safer design suitable for one machine is adaptable to another is a question of feasibility to be decided by the trier of fact, not a question to be resolved in ruling on discovery requests. *Id.* at 574. Evidence of the actual use of, or availability of practical, safer alternatives is therefore relevant. *Boatland of Houston v.*

Bailey, 609 S.W.2d 743, 746 (Tex. 1980). We cannot presume harm resulted, even if we find Cantrell has shown on appeal that proper discovery was denied. *Jampole*, 673 S.W.2d at 576. The burden is on Cantrell to show error requiring reversal. *Pope v. Stephenson*, 787 S.W.2d 953, 954 (Tex. 1990).

Although Coats built a diverse line of tire-changing machines, all Coats tire changers used basically the same inflation system to seat the beads and inflate the tires. The trial court should have allowed the discovery of documents relating to safer Coats designs using the same or similar inflation system. The availability before 1983 of a pressure-limiting device on other Coats machines appears to be not only discoverable but directly relevant to the central question in the case. We find that the trial court abused its discretion in limiting discovery to 40.40A machines only.

The documents attached to Cantrell's motion for new trial show Coats' efforts, as early as 1975, to research,

develop, and evaluate safety devices to be used on their lines of tire-changing machines. Although Coats consistently maintained at trial that such a device was not available nor feasible in 1983, an internal Coats memorandum indicates that by 1975, the main practical problem had already been solved. The memo showed the results of an inflation test using a pressure-limiting device that yielded a negligible increase in inflation time compared to inflation time without the safety device.

Coats successfully objected to the discovery of safety devices on other Coats tire-changing machines. Coats then argued Cantrell's failure to show the availability and feasibility of any safety devices at the time the 40.40A was manufactured, the very evidence Coats had successfully kept from the jury. Cantrell has shown that such evidence existed but was not discoverable under the trial court's order. Harm is shown.

We conclude that the improper discovery order by the trial court amounted to such a denial of the rights of the

appellate as was reasonably calculated to cause and probably is cause rendition of an improper judgment, or was such as probably prevented the appellant from making a proper presentation of the case to the appellate court. Tex. R. App. P. 81(b)(1). Therefore, the judgment of the trial court is reversed and the case remanded for a new trial.

BILL BASS
Justice

Opinion delivered March 31, 1992.
Colley, P.S., J., not participating.

(PUBLISHED)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

March 31, 1991

No. 12-89-00251-CV

SCOTT CANTRELL,

Appellant

V.

HENNESY INDUSTRIES, INC. AND THE COATS COMPANY,

Appellees

Appeal form the 62nd Judicial District Court
of Hopkins county, Texas (Tr.Ct.No. 25,144)

THIS CAUSE came on to be heard on the transcript of the record, and the same being inspected, it is the opinion of the Court that there was error in the judgment as

entered by the trial court below and that the same should be reversed and remanded for a trial on the merits.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below be reversed and the cause remended for a trial on the merits in accordance with the opinion of this Court; and that all costs of this appeal be, and the same are, adjudged against the Appellees, Hennesy Industries, Inc. and the Coats Company, for which let execution issue; and that this decision be certified to the court below for observance.

Justice Bill Bass.

Court of Appeals

Twelfth Court of Appeals District

1517 West Front Street
Suite 354
Tyler, Texas 75702

June 18, 1992

Hon. Leonard Davis
P. O. Box 359
Tyler, TX 75710

Hon. Jeffrey S. Lynch
8080 N. Central Expressway
Suite 900
Dallas, TX 75206-1887

RE: Case No. 12-89-00251-CV
Trial Court No. 25,144

Style: Cantrell, Scott
v. Hennessy Industries, Inc., et al

Dear Counsel:

You are hereby notified that in the above-described cause, the following decision and order was this day made and entered by this court:

"Appellee's Motion for Rehearing having been duly considered, it is ORDERED that said motion be, and hereby is, overruled."

Respectfully yours,

/s/ Carolyn Allen
CAROLYN ALLEN,
CLERK

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

October 21, 1992

Ms. Laura A. Frase
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Mr. Michael E. Starr
Potter, Guinn, Minton,
Roberts & Davis, P.C.
P.O. Box 359
Tyler, TX 75710

RE: Case No. 0-2692

Style: THE COATS COMPANY, a division of HENNESSY INDUSTRIES, INC., a subsidiary of DANAHER CORPORATION v. SCOTT CANTRELL

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Respectfully yours,

JOHN T. ADAMS,
CLERK

BY: /s/ Tencha Damian
Tencha Damian, Deputy

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

December 2, 1992

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P.O. Box 359
Tyler, TX 75710

RE: Case No. 0-2692

Style: THE COATS COMPANY, a division of HENNESSY INDUSTRIES, INC., a subsidiary of DANAHER CORPORATION v. SCOTT CANTRELL

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS,
CLERK

BY: /s/ Tencha Damian
Tencha Damian,
Deputy

NO. 25,144

SCOTT CANTRELL	§	IN THE DISTRICT
	§	COURT OF
	§	
VS.	§	HOPKINS COUNTY,
	§	TEXAS
	§	
KELLY-SPRINGFIELD TIRE	§	
COMPANY	§	
AND THE COATS	§	
COMPANY ADIVISION	§	
OF HENNESSY	§	62ND JUDICIAL
INDUSTRIES	§	DISTRICT

MOTION FOR PROTECTIVE ORDER

COMES NOW The Coats Company, a Division of Hennessy Industries, defendant in the above-entitled and numbered cause and files this its Motion for Protective Order pursuant to Rule 166(b)(5) of the Texas Rules of Civil Procedure.

I.

The above case involves a personal injury accident caused to plaintiff when plaintiff was allegedly changing a tire and tire rim on a tire manufactured by defendant Kelly-

Springfield Tire Company, Model No. 40-40A, and a tire changing machine manufactured by The Coats Company, a Division of Hennessy Industries. On January 26, 1989, the depositions of Jim Holladay and Charles Cunningham of The Coats Company were noticed for depositions in Nashville, Tennessee and a subpoena duces tecum was attached to that deposition notice. (Exhibit "A") Pursuant to the subpoena duces tecum, defendants produced maintenance materials, operating instructions, blueprints of warning labels, copies of warning labels, a complete parts list with parts drawings, installation instructions, and maintenance instructions on certain component parts. During the course of the deposition of Jim Holladay, plaintiff's counsel made a number of new and/or expansive requests of earlier requests and it is from these requests which defendant now seeks protection.

II.

On February 2, 1989, defendant received a new Notice of Intention to Take Deposition of Charles Cunningham along

with four other company employees or former employees for beginning Monday, February 13, 1989, along with a Second Request for Production of Documents to Hennessy Industries, Inc., attached hereto as Exhibit "B". The Second Request has also been attached as a subpoena duces tecum to the deposition notice. (Exhibit "C") The Second Request for Production of Documents requests production of organizational charts for Hennessy Industries; current catalogs for Danaher Corporation Companies including The Coats Company, Solar Industries, and Matco; copies of all claim files, copies of all engineering documents, financial information, etc. In all, 34 new requests for additional documents and/or materials have been made.

Defendant seeks protection from having to produce these materials at the time of the depositions noticed for February 13, 1989. Defendant would show that many of the requests made would require defendant to create files where none exists as well as retrieve thousands of engineering documents including blueprints and component part

specifications which are scattered throughout the company not only on the Model 40-40A tire changer in question, but also on prior generations of the Model 40-40A tire changing machine. As defendant explained during the deposition of Jim Holladay, retrieval of said requests will in all likelihood require months. (See deposition of Jim Holladay, Exhibit D, p. 128-129) Defendant would show that at this time, it has not had an opportunity to review to what extent they have the requested materials, in what format the requested materials are contained, and the location of all the requested materials. Until defendant has had such opportunity to do so, it will not be in a position to meaningfully respond to this Subpoena Duces Tecum or Second Request for Production either by way of production or objection. Defendant would request that the Court allow it no less than two months to respond to this request for production of documents, and at the very least that the Court protect it from having to produce said materials at the depositions

noticed for February 13-14, 1989, as required by plaintiff's Subpoena Duces Tecum.

To require defendants to both search and produce said documents at this time would be onerous, burdensome, and prejudicial to defendants.

WHEREFORE, PREMISES CONSIDERED, defendant respectfully requests this Court to grant this Motion for Protective Order protecting it from production at this time and allowing it sufficient time to respond to plaintiff's second request for production.

Respectfully submitted,

GARDERE & WYNNE

By: /s/ Clint A. Corrie
Jeffrey S. Lynch
State Bar No. 12727500

Clint A. Corrie
State Bar No. 04840300
717 N. Harwood St.
Dallas, Texas 75201
(214) 979-4500
ATTORNEYS FOR
DEFENDANT
THE COATS COMPANY

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing has been forwarded by certified mail, return receipt requested to Mr. David Noteware, Thompson & Knight, 3300 First City Center, 1700 Pacific Avenue, Dallas, TX 75201; and by Federal Express to Jay N. Green, Potter, Guinn, Minton, Roberts & Davis, P.C., 500 NCNB Center Tower, Tyler, Texas 75710 this 9th day of February, 1989.

/s/ Clint A. Corrie
Clint A. Corrie

NO. 25,144

SCOTT CANTRELL	§	IN THE DISTRICT
	§	COURT OF
	§	
VS.	§	HOPKINS COUNTY,
	§	TEXAS
	§	
HENNESSY INDUSTRIES	§	
AND THE COATS	§	62ND JUDICIAL
COMPANY	§	DISTRICT

ORDER

CAME ON TO BE HEARD on this 13th day of March, 1989, Defendant's Motion for Protective Order regarding Plaintiff's Second Request for Production of Documents. The Court having read the briefs and having heard the arguments of counsel is enters the following order:

ORDERED, that Defendant produce the following documents, excluding any documents which are attorney/client privileged communication and work product, regarding the Coats Model 40.40A tire changer manufactured from 1978 through 1983:

1. Parts lists.

2. Supplier lists.

3. Cost lists.

4. Claim files.

5. Expert reports.

7. Depositions of Jim Holladay, Charles Cunningham and expert witnesses.

IT IS FURTHER ORDERED that Defendant shall provide Plaintiff with a list of all documents to which it claims an attorney/client privilege or work product privilege.

IT IS FURTHER ORDERED that Defendant shall produce to the Plaintiff the OSHA lobbying file.

IT IS FURTHER ORDERED that Defendant shall produce for inspection a prototype, of the pneumatic inflator and/or computer inflator to the extent they exist on or after March 13, 1989, at the Defendant's facility in Nashville, Tennessee.

IT IS FURTHER ORDERED that Defendant shall produce the patent application or patent for the pneumatic inflator and the computerized inflator.

IT IS FURTHER ORDERED that Defendant produce the name of the supplier and the cost of the safety device employed on the pneumatic inflator and the computer inflator.

IT IS FURTHER ORDERED that the Court will conduct an in camera inspection only if it is advised by the Plaintiff that the lists of privileged documents to be provided by the Defendant are not adequate.

ENTERED this 6th day of April, 1989.

/s/ Jim N. Thompson
JUDGE PRESIDING

NO. 25,144

SCOTT CANTRELL	§	IN THE DISTRICT
	§	COURT OF
	§	
VS.	§	HOPKINS COUNTY,
	§	TEXAS
	§	
HENNESSY INDUSTRIES	§	
AND THE COATS	§	62ND JUDICIAL
COMPANY	§	DISTRICT

CHARGE OF COURT

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions

which you should carefully and strictly follow during your deliberations.

1. Do no let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer

made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because you conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense which varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance

of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case.

Whenever a question requires other than a "Yes" or "No" answer, your answer must be based on a preponderance of the evidence.

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

"Defectively designed" or "defective design" means a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use.

"Producing cause" means an efficient, exciting, or contributing cause, which in a natural sequence, produced the occurrence. There can be more than one producing cause.

"Negligence" means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary care" means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

"Proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result

therefrom. There may be more than one proximate cause of an event.

"Gross negligence" means more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected.

"Tire changing machine" means the Coats 40.40A manufactured by Hennessy Industries in 1983 bearing Serial #65143, which Scott Cantrell was using at the time of his accident on April 4, 1987.

"Hennessy Industries" means the corporate entity of Hennessy Industries, Inc., including its operating division and/or tradename of The Coats Company.

QUESTION NO. 1

Do you find the Coats 40.40A tire changing machine was defectively designed at the time it was manufactured by Hennessy Industries, Inc. in 1983?

ANSWER "YES"OR "NO"

ANSWER: No

If you have answered Question No. 1 "yes" and only in that event, then answer the following question.

QUESTION NO. 2

Do you find from a preponderance of the evidence that the defective design was a producing cause of the occurrence in question?
ANSWER "YES"OR "NO"

ANSWER: ---

QUESTION NO. 3

Do you find that Hennessy Industries, Inc. was negligent in its design of the Coats 40.40A machine at the time it was manufactured?

ANSWER "YES"OR "NO"

ANSWER: No

If you have answered Question No. 3 "yes", then answer the following. Otherwise, do not answer.

QUESTION NO. 4

Was the negligence, if any of Hennessy Industries a proximate cause of the injuries in question?

ANSWER "YES"OR "NO"

ANSWER: _____---------_____

QUESTION NO. 5

On the occasion in question, was Scott Cantrell negligent in operating the tire changing machine?

ANSWER "YES"OR "NO"

ANSWER: _____Yes_____

If you have answered Question 5 "yes", then answer Question 6. Otherwise, do not answer.

QUESTION NO. 6

Was the negligence, if any, of Scott Cantrell a proximate cause of the injuries in question?

ANSWER "YES"OR "NO"

ANSWER: _____Yes_____

QUESTION NO. 7

If you answered "Yes" to Question 2 and 6, then answer this question. Otherwise, do not answer this question.

In answering this question, you are instructed that the percentage of responsibility attributable to a product or a party is not necessarily measured by the number of product defects found, acts, or omissions. The percentages you find must total 100%.

For each product or party found by you to have caused the occurrence or injuries, find the percentage caused by:

The tire changing machine: _____ %

Scott Cantrell: _____ %

Total 100% _____

necessarily measured by the number of acts or omissions found. The percentages you find must total 100%.

For each party found by you to have caused the occurrence or injuries, find the percentage caused by:

Hennessy Industries: _____ ----- _____%

Scott Cantrell: _____ ----- _____%

Total _____ 100% _____

QUESTION NO. 9

If the answer to Question No. 2 or 4 is "yes", then answer the following question. Otherwise, do not answer.

Was such conduct of Hennessy Industries, Inc. "gross negligence?"

ANSWER "YES" OR "NO"

ANSWER: _____ ---------- _____

QUESTION NO. 10

In answering these questions, consider the elements of damages listed following each question and none other. Consider each element separately. Do not include damages for one element in any other element. Do not reduce the amounts, if any, in your answers because of the negligence, if any, of Scott Cantrell.

What sum of money, if paid now in cash, would fairly and reasonably compensate Scott Cantrell for his injuries in the past, if any, that resulted form the occurrence in question?

Answer in dollars and cents, if any, in each blank:

		IN THE PAST
A.	Loss of Earnings	$ -0-
B.	Medical Care	$ -0-
C.	Physical Pain and Mental Anguish	$ -0-
D.	Physical Impairment	$ -0-
E.	Disfigurement	$ -0-

QUESTION NO. 11

What sum of money, if paid now in cash, would fairly and reasonably compensate Scott Cantrell for the injuries that in reasonable probability he will sustain in the future, if any, that resulted form the occurrence in question?

Answer in dollars and cents, if any, in each blank:

		IN THE FUTURE
F.	Loss of Earnings Capacity	$ -0-
G.	Medical Care	$ -0-
H.	Physical Pain and Mental Anguish	$ -0-
I.	Physical Impairment	$ -0-
J.	Disfigurement	$ -0-
K.	Home Care	$ -0-
L.	Transportation	$ -0-

QUESTION NO. 12

If you have answered "yes" to Question No. 9, then answer this Question. Otherwise do not answer this question.

What sum of money, if any, should be awarded Scott Cantrell as exemplary damages against Hennessy Industries?

> "Exemplary damages" means an amount that you may in your discretion award as an example to others, as a penalty or by way of punishment, in addition to any amount that you have found as actual damages.

Answer in dollars and cents, if any.

ANSWER: $ _____

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror:

1. to preside during your deliberations;

2. to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;

3. to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge;

4. to vote on the questions;

5. to write your answers to the questions in the spaces provided; and

6. to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all the questions you are required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

/s/ Jim N. Thompson
JUDGE PRESIDING

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

(To be signed by the presiding juror if unanimous.)

_____

PRESIDING JUROR

(To be signed by those rendering a verdict if not unanimous.)

/s/ Robert L. Carpenter	/s/ George Clifton
/s/ Pam Johnson	/s/ Larry Connaughton
/s/ Patricia Morgan	/s/ Billy R. Pearson
/s/ Peggy Ketron	/s/ Douglas McCool
/s/ Glenda J. Christian	/s/ Roger Caudle
/s/ J.C. Martin	

Volum 23 page 442

Regarding Plaintiff's Exhibit #120 Cantrell vs. Kelly-Springfield have problem with title.

/s/ Roger Caudle

Disregard Kelly-Springfield. They are not in the case.

/s/ Jim N. Thompson

Volume 23 page 443

Please send Webster dictionary to jury room, definition of prudence.

/s/ Rober Caudle

You will have to follow the definition in the charge. No additional can be given.

/s/ Jim N. Thompson

Volume 23 Page 444

Would like to have testimony of Todd Gorton and his deposition, please

/s/ Roger Caudle

Also, depositions cannot be sent to jury room, and see attached instructions.

/s/ Jim N. Thompson

if the jury disagree as to the statement of any witness they may, upon applying to the Court, have read to them from the Court Reporter's notes that part of such witness' testimony as to the particular point in dispute and no other.

In accordance with this rule, you are instructed that a request to have the Court Reporter's notes read could not be complied with unless the jury disagree as to the statement of a witness. Therefore, it will be necessary for you to state that your are in disagreement as to the statement of such witness or witnesses, if you are, and you should request that part of such witness' or witnesses' statement on the point in dispute and only that point in dispute.

In this connection you are further instructed that the Reporter will be required to read all of the testimony of the witness involved in order to pick out the point or points upon

which you state that you have disputed, and it will take the Court Reporter as long to read the testimony back as it did for the attorneys to put the testimony on; so in the event you ask that any testimony be read back, that you be patient and give the Court Reporter sufficient time to read the testimony which will be required of him and select the testimony on the point or points in dispute.

/s/ Jim N. Thompson
JUDGE PRESIDING

NO. 25,144

SCOTT CANTRELL	§	IN THE DISTRICT COURT
	§	
VS.	§	HOPKINS COUNTY, TEXAS
	§	
HENNESSY INDUSTRIES AND THE COATS COMPANY	§	62ND JUDICIAL DISTRICT

JUDGMENT

Came for hearing the above-referenced proceeding, and each party hereto having appeared in person and announced ready for trial, this case was submitted to a jury on May 17, 1989 at the conclusion of evidence. The charge of the Court and the verdict of the jury are incorporated herein by reference. It appearing to the Court that the verdict of the jury was for the Defendants and against the Plaintiff and the Intervenor, judgment should be rendered upon the verdict in favor of the Defendants and against the Plaintiff and the Intervenor. It is therefore

ORDERED that the Plaintiff Scott Cantrell take nothing by his suit; and it is further

ORDERED that the Intervenor Ohio Casualty Company take nothing by its suit; and it is finally

ORDERED that the Defendants Hennessy Industries, Inc. and The Coats Company recover their costs of court from the Plaintiff Scott Cantrell and the Intervenor Ohio Casualty Company and that execution shall issue forthwith if not timely paid.

ENTERED this 15 day of June, 1989.

/s/ Jim N. Thompson
JUDGE

Case Style	Justices Noted
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819 S.W.2d 877 (Tex.App.--Tyler 1987) *Mayes v. State* November 10, 1987 Rehearing Denied April 7, 1988	Justice Colley
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829 S.W.2d 957 (Tex.App.--Tyler 1990) *Burkes v. State* June 29, 1990	*Per Curiam*

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813 S.W.2d 236 — Chief Justice Ramey
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822 S.W.2d 103 — Justice Colley
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842 S.W.2d 700 Justice Bass
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829 S.W.2d 922 — Justice Bass
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831 S.W.2d 40 — Justice Chadick (Ret'd)
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831 S.W.2d 399 — Justice Chadick (Ret'd)
(Tex.App.--Tyler 1992) — Justice Bissett (Ret'd)
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835 S.W.2d 187 (Tex.App.--Tyler 1992) *Smith v. Smith* June 30, 1992	Justice Colley
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835 S.W.2d 825 (Tex.App.--Tyler 1992) *Thomas v. Allsip* August 28, 1992	Justice Colley
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835 S.W.2d 351 (Tex.App.--Tyler) *Thomas v. Holder* August 31, 1992	*Per Curiam*
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840 S.W.2d 647 Justice Smith (Ret'd)
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840 S.W.2d 675 Justice Bass
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843 S.W.2d 205 (Tex. App.--Tyler 1992) *Ex Parte Johnson* November 24, 1992	Justice Colley

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 92-1580

In The

Supreme Court of the United States

October Term, 1992

COATS COMPANY,

Petitioner,

vs.

SCOTT CANTRELL,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Appeals For The Twelfth District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 92-1580

In The

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COATS COMPANY,

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SCOTT CANTRELL,

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On Petition For Writ Of Certiorari To The Texas Court Of Appeals For The Twelfth District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Texas Court of Appeals for the Twelfth District issued its decision on March 31, 1992. Scott Cantrell, Respondent, files this Brief in Opposition to the Petition for Writ of Certiorari filed by The Coats Company, a division of Hennessy Industries, Inc., a subsidiary of Danaher Corporation. Mr. Cantrell asks the Court to deny Coats' Petition for Writ of Certiorari to the Court of Appeals for the Twelfth District of Texas.

STATEMENT OF THE CASE

I. Federal Question or Constitutional Issue not Raised Below

The Coats Company ("Coats") petitions this Court for writ of certiorari on the grounds that the Twelfth District Court of Appeals of the State of Texas violated Coats' right to be free from deprivation of property without due process of law guaranteed in the Fourteenth Amendment to the United States Constitution. The alleged due process violation consists of an opinion by the Tyler Court of Appeals reversing the trial court's improper order limiting discovery in a manner inconsistent with the Texas Rules of Civil Procedure and the opinions of the Texas Supreme Court. Because Coats is unhappy with the result in the Tyler Court of Appeals and the Supreme Court of Texas' denial of its Application for Writ of Error, it seeks review in this Court of a matter which encompasses only Texas procedural rules governing the discovery process.

Coats argues that the purported federal question or constitutional issue was properly presented to the Texas Supreme Court in application for writ of error following the rendition of judgment by the court of appeals. Coats complains of two matters in the court of appeals opinion: 1) that the opinion was so arbitrary, capricious and unfair that it will require Coats to expend further attorney's fees and expenses, thus depriving Coats of property without due process of law; and 2) that the Twelfth District Court of Appeals violated the laws of the State of Texas by issuing an opinion in which only one justice participated.

A. Due process not raised below.

Coats' due process argument was not raised in the Texas Supreme Court on appeal from the Twelfth District Court of Appeals. At page 4 of its petition, Coats asserts that the vehemence of its disagreement with the Texas court of appeals constituted an assertion of its more recently contrived due process argument. As a matter of fact, its deprivation of property argument was neither expressly raised nor raised by "clear intendment."

In essence, Coats asserts that the error committed by the court of appeals was so egregious that it constituted a per se due process violation which should have been obvious to the Texas Supreme Court without the need for express presentation for the higher court's review. Contrary to Coats' position, the Texas Supreme Court never received an opportunity to rule on the due process question. Coats' argument to the contrary stretches the meaning of the term "clear intendment" beyond imagination. As was clearly stated by this Court in *Street v. New York*, an opinion cited by Petitioner, this Court does not have power to consider a question of the constitutionality of a state statute or action unless the question was presented to a court in that state. *Street v. New York*, 394 U.S. 576 (1969). In its Petition, Coats failed to cite the portion of *Street* which states that the constitutionality question must be "brought to the attention of the state court *with fair precision and in due time.*" (emphasis added) *Id.* at 584.

In *Street*, the petitioner complained of the unconstitutionality of a New York statute. He had raised that question *expressly* in the trial court by motion and in both state courts of appeals in briefs. *Id.* at 579. Coats' complaint in

the Texas Supreme Court was totally silent as to the Fourteenth Amendment to the U. S. Constitution. At Page 4 of its Petition, it cited the part of its application to the Texas Supreme Court which it believed raised the federal question by clear intendment. As is obvious from that excerpt, Coats merely complained about a discovery ruling in the Texas Supreme Court. It did not complain, either expressly, impliedly or by clear intendment, about a violation of its rights under the U. S. Constitution. In fact, the due process argument asserted before this Court is merely a last ditch effort to complain about an opinion of a Texas court of appeals on an issue involving Texas procedural rules.

B. Participation in court of appeals not raised below.

In its Petition to this court, Coats totally ignores its failure to raise the court of appeals' participation argument in the Texas Supreme Court. Presumably Coats' position is that the alleged failure of the court of appeals to follow Texas statutes was also such an obvious error that the Texas Supreme Court should have anticipated Coats' position and complaint without the necessity of that position being raised in its application for writ of error. That argument is totally untenable, especially in light of the fact that such a due process argument would have been preserved in every opinion handed down by the Tyler Court of Appeals in a manner consistent with the one in this case. That result would be absurd.

Coats' complaint regarding the procedural defect committed in the Twelfth District Court of Appeals opinion was never raised before any court before it was asserted to this Court in Coats' Petition for Writ of Certiorari. Even if the court of appeals' opinion did reflect a fatal defect created by the lack of a majority of the justices of that court (an argument which Respondent adamantly denies), such a matter would necessarily be more appropriately submitted to the Texas Supreme Court for an opinion regarding Texas statutes and the practices of a Texas court of appeals.

C. Alleged non-federal ground.

Coats also suggests, in the alternative, that if no federal question was properly raised in the state courts below, the state supreme court's decision rests on a non-federal ground without any fair or substantial support. Coats cites *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958), as support for that argument. That case does not provide support for Coats' meager attempt to conjure jurisdiction in this Court. Unlike *NAACP v. Alabama*, the case at bar contains no federal question which was presented to the Texas Supreme Court. Cantrell does not rely on a non-federal argument to prevent this Court from deciding a federal question. On the contrary, no federal question was ever raised below.

Because neither of the complaints raised by Coats in its Petition for Writ of Certiorari have been raised in the courts of the State of Texas, this Court does not have jurisdiction to review the judgment of the court of

appeals or the denial of writ of error by the Texas Supreme Court. Those decisions are not reviewable by this Court, and Coats' Petition for Writ of Certiorari should be denied.

II. Coats' Mischaracterization of the Material Facts.

Coats spends some considerable effort in its Petition reciting all of the discovery conducted in preparation for trial of this case (Petition for Writ of Certiorari 7-8; 13-15). Coats ignores, however, the clear limitation imposed by the trial court in response to Cantrell's attempts to discover safety devices on a machine similar to the defective product which formed the basis of Cantrell's claims. At trial Cantrell sought discovery of design problems in safety devices for the predecessor models to the model 40.40A tire changing machine, which predecessors included the 10.10A, 20.20A, 30.30A and 30.40A. Cantrell also requested the same information regarding Coats' European-style machines. Coats objected that Cantrell's discovery requests concerning the predecessor models to the 40.40A and the European-style machine were beyond the scope of discovery because only the model 40.40A was involved in the explosion. The trial court sustained Coats' objections and limited discovery to the model 40.40A tire changing machine. Coats fails to disclose to this Court that Coats' position at trial was that the court's discovery order limited discovery to the model 40.40A tire changing machines. Coats' objection was that discovery should be limited to the model 40.40A machine. The court's order on Coats' motion for protection limited production to documents "regarding the Coats' model

40.40A tire changer manufactured from 1978 through 1983."

During pretrial, when the trial court was considering Coats' motion in limine, Scott Davis, an attorney for Coats, presented paragraph 9 of the motion. Paragraph 9 sought to exclude "any reference to any model or type of tire changing machine manufactured by the Defendant other than the Coats 40.40A or the Coats 40.40SA." Scott Davis stated to the trial court: "No. 9 is basically a furtherance of the protective order that the court entered previously." The trial judge responded: "Well, I think in the protective order I limited it to this particular model machine." Later, in its response to Cantrell's motion for new trial, the attorneys for Coats stated that at the discovery hearing, the trial court "sustained the Defendant's objections to the production of certain documents pertaining to the predecessor models of the 40.40A and European-style tire changers." Despite fifteen months of active pretrial discovery, the trial court prevented Cantrell from the discovery of information which was crucial to his case against Coats.

The court of appeals' reliance upon *Jampole v. Touche*, 673 S.W.2d 569 (Tex. 1984), was proper and led to the correct result in this case. By persuading the trial court to limit discovery in this case to the 40.40A only, Coats was able to withhold from Cantrell extensive work which Coats did on various inflation safety devices in the period from 1975 to 1978. Coats only produced documents regarding safety devices that were dated after 1978 when the model 40.40A was manufactured. One of Coats' main

arguments at trial was that no safety device was developed until 1987. The undisclosed documents would have been most persuasive that such inflation devices were feasible some ten years earlier. Relying on the trial court's erroneous discovery ruling, Coats withheld all of the information and documents listed above. Cantrell uncovered these documents through his own limited sources. Cantrell was thus prevented from rebutting Coats' evidence at trial concerning the frequency of tire explosion incidents.

By asserting that Cantrell was permitted to offer evidence of alternative safety devices and engage in discovery regarding those devices, Coats ignores the severe limitation placed on Cantrell by the court's protective order and the crippling effect of that order on Cantrell's ability to demonstrate the feasibility of effective safety devices at the time the 40.40A was manufactured.

As demonstrated by Cantrell and concluded by the court of appeals, the trial was not fair to both parties. The jury was deprived of evidence that Coats had withheld from discovery regarding feasible safety devices on its pre 40.40A and European-style machines.

ARGUMENT FOR DENYING THE COATS COMPANY'S PETITION

I.

The decision of the court of appeals was a carefully considered and well reasoned opinion which clearly included review of the entire record on appeal.

Consistent with the Texas Supreme Court opinion in *Jampole v. Touche,* the court of appeals reached a decision which was neither arbitrary nor unfair to Coats. *Jampole v. Touche,* 673 S.W.2d 569 (Tex. 84). *Jampole* was a products liability action in which the plaintiff complained that an automobile manufactured by General Motors Corporation was unreasonably dangerous. The plaintiff complained of the trial court's order limiting discovery to knowledge and information based on records pertaining to a particular series of automobiles, 1971-1977 Vegas and Astros. The vehicle complained of was a 1976 Vega. The plaintiffs claimed that the 1976 Vega was defective because the fuel tank design allowed fuel to escape. The Texas Supreme Court held that the trial court took an unduly restrictive view "of the degree of similarity necessary for tests of other vehicles to be relevant." *Jampole,* 673 S.W.2d at 573. The court held that whether a safer system in one auto was adaptable to another was a question for the trier of fact and not one to be decided in discovery. *Id.* at 574.

Consistent with *Jampole,* the court of appeals concluded that Cantrell should have been permitted to discover evidence of safety devices on tire changing machines similar to the Coats model 40.40A. As discussed above, despite the discovery which did take place in this trial, a large amount of crucial evidence was withheld by Coats using the trial court's order as a shield. The trial court's order obviously limited Cantrell to discovery of safety devices manufactured beginning in 1978 and pertaining to the model 40.40A only. This prevented Cantrell from discovery of much of the information regarding Coats' predecessor models and the European-style machine which Cantrell unearthed from sources other

than Coats. Much of the information which Cantrell's attorneys found other places was not admitted by the trial court or was not discovered until after the trial.

At page 14 of its Petition, Coats asserts that the trial court's order did not expressly limit discovery but rather required production of documents and things. Such a position is comical when cast against the background of Cantrell's discovery requests which were much broader than the court's order, an order entered in response to Coats' Motion for Protective Order. The order completely ignored information later found by Cantrell regarding devices known to Coats prior to 1978 which were obviously feasible at that time.

Contrary to Coats' argument at page 15 of its petition, the European-style machine and predecessor models to the 40.40A were all similar with regard to the air inflation system. The trial court's pretrial order did preclude Cantrell from obtaining discovery of alternative safety devices. The order specifically prevented Cantrell from discovery of devices other than those on the model 40.40A beginning in 1978. Much of the evidence offered and excluded at trial was uncovered by Cantrell on his own and does not support Coats' assertion that no discovery limitation existed.

Despite Coats' frustration with the court of appeals' opinion, it does not constitute a violation of Coats' protection against deprivation of property without due process of law. The court of appeals properly interpreted Texas procedural rules of discovery consistent with previous Texas Supreme Court opinions, and its decision did

not violate principles of fundamental fairness in a manner inconsistent with the Fourteenth Amendment to the United States Constitution. There was a substantial basis for the court of appeals' opinion, and that opinion should be allowed to stand.

II.

Coats also complains about the court of appeals' opinion on the grounds that it was rendered by one justice in violation of the Texas Constitution, Texas statutes and the Texas Rules of Appellate Procedure. Based on that assertion, Coats argues that the court deprived it of due process by rendering an opinion in which only one justice participated.

Coats incorrectly relies on Texas Rule of Appellate Procedure 90(b) which requires the notation of the names of justices participating in a decision rendered by a *panel* of a Texas court of appeals. As noted by Coats in its petition, Texas Government Code Section 22.222(a) provides for rendition of court of appeals' opinions with the courts sitting in panels of three justices. A portion of Texas Rule of Appellate Procedure 90 relied on by Coats involves a written opinion or order handed down by a panel. The Twelfth District Court of Appeals sitting at Tyler, Texas, did not render its opinion in this case while sitting as a panel. As set out in Texas Government Code Section 22.216(1), the Twelfth District Court of Appeals consists of only three justices. Unlike the Fifth District Court of Appeals in Dallas which consists of thirteen judges, the Twelfth District Court of Appeals has never rendered any decision as a "panel," because it consists of

only three justices. As a result, the notation of names required by Texas Rule of Appellate Procedure 90(b) does not apply to the Tyler Court of Appeals.

Consistent with the custom and practice of all of the courts of the State of Texas, written opinions signed by a justice for the court do not include a notation of the names of all judges or justices participating. Those opinions do contain a notation of any judges or justices who do not participate. The notation that Justice Colley did not participate in the court of appeals' opinion in question further belies Coats' argument that only one judge participated. As is obvious from the court's opinion at page 5, Justice Colley is the only justice who did not participate in that opinion. Justice Bass signed the opinion for the court which was duly rendered by the majority of that court necessary to hand down a decision.

Despite Coats' assertion that the Tyler Court of Appeals has engaged in a pattern of abuse by rendering thirty-five of forty-two 1992 opinions with only one justice participating, the opinion of that court in this case was an opinion handed down by a majority of the entire court and signed on behalf of the court by Justice Bass.

Coats also points to two of the opinions of the Twelfth Court of Appeals which it claims bear a notation that all three judges participated. Apparently, Coats argues that the only opinions properly handed down by that court in 1992 were the two with all three names and the ones rendered per curiam. That position is patently ridiculous. The Appendix to this response contains certified copies of the two opinions referred to by Coats. The opinions clearly bear the names of less than all three

justices without a reference to any abstaining justice. Although the official reporter for the State of Texas (the apparent source of Coats' appendix pp. 47a-61a) bears the names of all three justices, the court's original opinions were handed down in the same form as the opinion in *Cantrell v. Hennessey Industries, Inc.*, 829 S.W.2d 875 (Tex. App. – Tyler 1992, writ denied). The absence of a notation concerning Chief Justice Ramey does not infer or imply that he did not participate in the *Cantrell* decision.

CONCLUSION

The Twelfth District Court of Appeals for the State of Texas rendered a decision consistent with the Texas Rules of Civil Procedure governing discovery and prior opinions of the Texas Supreme Court. The Texas Supreme Court reviewed the decision of the court of appeals and denied Coats' application for writ of error. Two appellate courts of the State of Texas have reviewed the trial court's discovery ruling and found it to be inconsistent with the laws of the State of Texas. No court in the State of Texas has had the opportunity to review Coats' lately contrived and flawed argument that the court of appeals' opinion violates due process and fundamental fairness and that the court of appeals illegally and improperly rendered a decision with the participation of only one justice. The decision of the court of appeals was neither arbitrary, capricious nor erroneous, and Coats was afforded all of its rights under the constitutions of Texas and the United States.

This Court does not have jurisdiction to rule on the complaints raised by Coats in its Petition for Writ of Certiorari. In light of that lack of jurisdiction and based on proper application of Texas law by the Twelfth District Court of Appeals, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari filed by The Coats Company.

Dated this 26th day of April, 1993.

Respectfully submitted,

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APPENDIX

NO. 12-89-00305-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

KEN GILBERT, D/B/A/ TYLER ARMATURE WORKS, APPELLANT	§	*APPEAL FROM THE COUNTY*
	§	
	§	*COURT AT LAW, NO. 2*
V.	§	*SMITH COUNTY, TEXAS*
	§	
BROWNELL ELECTRO, APPELLEE	§	
	§	

This is an appeal from a denial of a motion to set aside or vacate a default judgment and to grant a new trial. Gilbert failed to answer in the underlying lawsuit and now claims that he was entitled to a new trial under the test set out in ***Craddock v. Sunshine Bus Lines,*** 133 S.W.2d 124, 126 (Tex. 1939). We find that the trial court did not abuse its discretion in denying Gilbert's equitable motion for new trial. Accordingly, we affirm the trial court's judgment.

Appellee Brownell Electro, plaintiffs in the trial court, sued Gilbert, doing business as Tyler Armature Works, in Gilbert's individual capacity for a debt resulting from the purchase of merchandise. After Gilbert failed to answer, the trial court granted Brownell a default judgment against him in the amount of $9,247.28 for the debt, and $3,082.43 in attorney's fees. Gilbert thereafter timely filed his motion for new trial, along

with a sworn affidavit setting out the circumstances that allegedly entitled him to a new trial, and to have the default judgment set aside. Brownell did not file a controverting affidavit. However, the court held a hearing to determine whether it should order a new trial. The court denied the motion for new trial and made express findings of facts and conclusions of law in support of its decision. Gilbert, in his only point of error, claims that the trial court abused its discretion in denying his motion for new trial.

In ***Craddock v. Sunshine Bus Lines,*** the Supreme Court discussed the degree of discretion granted to trial courts in deciding motions for new trial: "[w]hile trial courts have some measure of discretion in the matter, as, in truth, they have in all cases governed by equitable principles, it is not an unbridled discretion to decide cases as they might deem proper, without reference to any guiding rule or principle." ***Craddock,*** 133 S.W.2d 124, 126 (Tex. 1939). The court then set out the often-cited, three-pronged test:

> A default judgment should be set aside and a new trial ordered in any case in which the failure of the defendant to answer before judgment
>
> [1] was not intentional, or the result of conscious indifference on his part, but was due to a mistake or accident;
>
> [2] provided the motion for a new trial sets up a meritorious defense and
>
> [3] is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.

Id.

In determining whether there was intentional disregard or conscious indifference, we must look to the knowledge and acts of the defendant. ***Strackbein v. Prewitt,*** 671 S.W.2d 37, 39 (Tex. 1984). Under ***Craddock,*** the presence of a mistake or accident negates the conscious indifference or intentional failure element of the test. ***Bank One, Texas v. Moody,*** 34 Tex.Sup.Ct.J. 616, 618 (April 18, 1992).

Gilbert claims that he failed to answer because he mistakenly thought the lawsuit was not against him individually, but against Gilbert Walton Enterprises, Inc., the corporate entity which he serves as president. The corporation had filed for bankruptcy prior to Brownell's lawsuit against Gilbert, and therefore he believed that the lawsuit would be automatically stayed. Gilbert also insists that he failed to answer because, at the time, he was experiencing cluster headaches that had required extensive pain medication and hospitalization.

Courts are required to accept as true the uncontroverted allegations of a defendant's affidavit that negate intentional or consciously indifferent conduct. ***Strackbein,*** 671 S.W.2d at 38-39. The question left unresolved by ***Strackbein*** is how must the movant's allegations be controverted? Must the non-movant controvert with his own affidavit before being entitled to a hearing? Or may the non-movant controvert the movant's allegations in the hearing on the motion?

In our case, Brownell did not file a counter affidavit, but the trial court held a hearing on the defendant's motion. Even absent a counter-affidavit, most courts of

appeals have reviewed a trial court's denial of an equitable motion for new trial by considering the evidence adduced at a motion for new trial hearing on the conscious indifference issue to see if the movant's affidavit has been controverted. ***See State Farm Life Ins. Co. v. Mosharaf,*** 794 S.W.2d 578, 584 (Tex. App. – Houston [1st Dist.] 1990, writ denied); ***Jackson v. Mares,*** 802 S.W.2d 48, 50 (Tex. App. – Corpus Christi 1990, writ denied); ***Gotcher v. Barnett,*** 757 S.W.2d 398, 401 (Tex. App. – Houston [14th Dist.] 1988, no writ); ***Royal Zenith Corp. v. Martinez,*** 695 S.W.2d 327 (Tex. App. – Waco 1985, no writ). Therefore, when the defendant's allegations are contested, the trial court must assume the role as fact-finder to determine if the defendant's conduct amounted to consciously indifferent or intentional behavior. The trial court at a motion for new trial hearing has the duty to ascertain the true facts surrounding the default circumstances. ***Stein v. Meachum,*** 748 S.W.2d 516, 517 (Tex. App. – Dallas 1988, no writ). The court is the sole judge of the credibility of a witness and the weight to be given to the testimony; it may choose to believe all, none, or part of a witness' testimony. ***Id.; Royal Zenith Corp.,*** 695 S.W.2d at 330.

The cross-examination of Gilbert at the motion for new trial hearing disclosed facts sufficient to support the trial court's conclusion that Gilbert's failure to answer proceeded from conscious indifference and not from a mistaken belief that the suit was against the bankrupt corporation. The court took judicial notice of prior lawsuits brought against Gilbert which he also failed to answer, although the corporation had yet to file for bankruptcy. There was also evidence that, despite the cluster

headaches, Gilbert was able to prepare and file documents relating to his corporation's bankruptcy proceeding. He had attended and testified at the Section 341(a) bankruptcy hearing during the same period of time that he received the citation for this underlying lawsuit.

The trial court considered all of the evidence before it and determined that Gilbert's failure to answer was a result of conscious indifference, not due to mistake or accident. We conclude that the trial court properly made its determination under the ***Craddock*** guidelines. The trial court did not abuse its discretion in denying Gilbert's motion for new trial.

The judgment is **affirmed.**

BILL BASS
Justice

Opinion delivered May 29, 1992.

(PUBLISH)

I, Carolyn Allen, Clerk *of the Court of Appeals of the Twelfth Court of Appeals District of the State of Texas, hereby certify that the foregoing five (5) pages contain a true and correct copy of the opinion filed in said court on the 29th day of May, 1992 in the following numbered and entitled cause:*

KEN GILBERT D/B/A TYLER ARMATURE WORKS

No. 12-89-00305-CV *vs.*

BROWNELL ELECTRO

on appeal to said court from Smith County, Texas

(SEAL)

WITNESS MY HAND *and the seal of said Court, at Tyler, Texas*

this the 23rd day of March, 1993.

/s/ Carolyn Allen
Carolyn Allen, Clerk

NO. 12-91-00057-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

WILLIE LEE DOUGLAS, APPELLANT	§	*APPEAL FROM*
	§	*THE 123RD*
V.	§	*JUDICIAL*
	§	*DISTRICT COURT*
THE STATE OF TEXAS, APPELLEE	§	
	§	*SHELBY*
	§	*COUNTY, TEXAS*

Appellant, Willie Lee Douglas, was convicted by a jury of aggravated possession of cocaine with intent to deliver[1] that substance. The court assessed his punishment at confinement for forty years.

Appellant presents two points of error. First, he claims the search of a vehicle he was driving was unreasonable under the Fourth Amendment. Second, he argues that the evidence is insufficient to support his conviction. We will first address and sustain his second point of error, reverse the conviction and order an acquittal.

In summary, the underlying facts and circumstances show that near midnight on the evening of February 5, 1990, a blue Ford van driven by Appellant and occupied by three other passengers was stopped on Highway 7 in Center, Texas, by City Police Officer Allen L. Martin.

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[1] Pursuant to TEX. HEALTH & SAFETY CODE ANN. § 481.112(a) (Vernon 1992) (hereinafter "Section 481.112(a)").

Martin testified that he had received a radio message from fellow officer John Sanders, who told him that the blue van had earlier weaved out of its travel lane and crossed the yellow center stripe of a downtown street. After receiving that message, Martin said he drove his patrol car to a position behind Sanders' vehicle, and then at Sanders' request passed Sanders' patrol car and followed directly behind the van for a short distance. Martin testified that he then observed the van "weaving" across the white lines of parking spaces along the city street so he activated his "overhead" lights and stopped the van. After the van was stopped, Martin said he walked up on the left side of the van and Sanders walked up on the right side.

The undisputed evidence reveals that, at that point, Appellant got out of the van from the driver's side door carrying his Louisiana drivers license and a "pink" paper that proved to be a rental agreement on the van from Wray Ford, Shreveport, Louisiana, lessor, to Lucille Whitley, lessee. Martin later testified that Appellant told him Whitley was his girlfriend who had rented the van for him on February 1, 1990. Martin said he asked Appellant at the time of the stop if any other persons were in the van, and that Appellant told him three friends were riding with him. Martin sent Appellant to the rear of the van where Sanders was standing and then Martin approached the van and asked the persons in the van if they had any identification papers. Each person replied no, and Martin testified that one of the three was "fumbling around between the [front and middle] seats." And Martin concluded that this person was trying to hide "something." Martin said he then entered the van,

searched the "map pocket" behind the driver's seat and found a loaded .32 caliber, six-shot revolver. Martin then said he placed Appellant and the other three persons under arrest and read them their "rights." Martin also testified that he personally searched Appellant's person and found a "large amount[2] of cash . . . in [Appellant's] right sock." The undisputed evidence also shows an additional $2,800 was found upon the search of the three passengers, and that Appellant was not intoxicated nor under the influence of cocaine, nor did he have any cocaine or other contraband on his person at the time of his arrest.

Following their arrest, Appellant, his friends and the van were taken by the Officers to the City Jail in Center. The Assistant Police Chief ordered a search of the van, using a drug dog. The animal sniffed about the van, "alerted" at the passenger side sliding door, and at the rear seat of the van. The dog was then taken to the back of the van, placed in the vehicle through the rear door, where the animal again "alerted" on the rear seat. Police Officer Tommy Alvis then entered the van, pulled up the rear seat and found a large bag of cocaine in a "hollow" in the seat cushioning of the rear seat. The bag contained 2.2 pounds[3] of cocaine.

Department of Public Safety Chemist Randall Lee Markle, identified the substance at trial as cocaine, and

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[2] The evidence shows that $1,200 was found by Martin on Appellant's person.

[3] 1001 grams.

the contraband was admitted into evidence before the jury.

We now address Appellant's second point of error. In response to Appellant's argument that the evidence does not supply sufficient affirmative links between the cocaine and the Appellant, the State contends that the evidence is sufficient to link the Appellant with the cocaine because: (1) appellant admitted (according to Officer Martin's testimony) that his girlfriend "leased the van for him"; (2) Appellant was the only occupant of the van who had a driver's license; (3) Appellant was in possession of the lease agreement; (4) Appellant had been in possession of the van for "at least 5 days"; (5) appellant quickly exited the van when it was stopped, a circumstance testified to by Officer Martin to be "unusual behavior . . . that . . . occurs only if the driver . . . has something to hide"; (6) 2 loaded handguns and "a glass crack pipe" were recovered from the van; (7) appellant was the driver of the van; (8) appellant possessed "a large sum of money concealed in his sock"; and (9) the cocaine had a large value ($70,000) on the street, therefore no one would "inadvertently" leave it in the van, so Appellant had to be aware of its presence.

Recently, in a cocaine possession case, the Court of Criminal Appeals upheld the judgment of acquittal by the Houston First Court of Appeals in circumstances where the defendant was the driver and sole occupant of a motor vehicle and "an unzipped cloth gym bag [was found] on the seat next to him where the [defendant] had been driving." *Humason v. State*, 728 S.W.2d 363, 364 (Tex. Cr. App. 1987). The *Humason* court reasoned that defendant's mere presence "in the vicinity" of a controlled

substance does not support the inference that he knowingly possessed a controlled substance "beyond a reasonable doubt." *Humason,* 728 S.W.2d at 367. That court ultimately held that the "affirmative links between [its] appellant and the cocaine whether considered individually or in combination, failed to eliminate the reasonable hypothesis[4] that appellant was entirely unaware of the presence of cocaine." ***Id.*** The court went on to observe that a person's mere presence" in the vicinity of a controlled substance has never been sufficient to establish joint possession." ***Waldon v. State,*** 579 S.W.2d 499, 501 (Tex. Cr. App. 1979).

The Court of Criminal Appeals in ***Humason*** concluded that the State failed to satisfy its burden of proof to establish that the Appellant "intentionally or knowingly exercised actual care, custody, control or management over [the cocaine]." ***Humason,*** 728 S.W.2d at 365; ***see also,*** Section 481.112(a) and ***McGoldrick v. State,*** 682 S.W.2d 573, 578 (Tex. Cr. App. 1985).

Moreover, in this case, while the court abstractly charged the jury on the law of parties (see transcript page 69), the paragraph of the charge applying the law to the facts in this case, reads:

> Now, bearing in mind the foregoing instructions, if you find and believe from the evidence beyond a reasonable doubt, that the defendant Willie Lee Douglas, on or about the 6th day of February, 1990, in Shelby County, Texas, did

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[4] Since the instant case was tried before the decision in ***Geesa v. State,*** 820 S.W.2d 154 (Tex. Cr. App. 1991), the reasonable hypothesis analysis is applicable.

> unlawfully, knowingly or intentionally possess with intent to deliver a controlled substance, namely, cocaine, in an amount by aggregate weight including any adulterates or dilutants of four hundred grams or more, then you will find the defendant guilty of unlawful aggravated possession with intent to deliver a controlled substance as charged in the indictment.

Because of the peculiar facts and circumstances of this case and the charge of the court we may not measure the sufficiency of the evidence here under the law of parties,[5] but must determine whether, viewing the evidence in the light most favorable to the verdict, any rational juror could have found each element of the offense beyond a reasonable doubt under the application paragraph of the charge. ***Jackson v. Virginia,*** 443 U.S. 307, (1979); ***see also, Dickey v. State,*** 693 S.W.2d 386, 387 (Tex. Cir. App. 1984).

Since the so called "reasonable-hypothesis-of-innocence analytical construct," ***see Geesa,*** 820 S.W.2d at 165, is to be employed in this circumstantial evidence case, we must determine whether the evidence excludes every reasonable hypothesis other than Appellant's guilt. ***Carlsen v. State,*** 654 S.W.2d 444 (Tex. Cr. App. 1983).

Based on the particular facts of this case we are persuaded that, although the evidence raises a strong suspicion of Appellant's guilt, the same evidence supports as well, the reasonable hypotheses[sic] that the

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[5] *See,* ***Jones v. State,*** 815 S.W.2d 667, 668-669 (Tex. Cr. App. 1991); ***Nickerson v. State,*** 782 S.W.2d 887, 891 (Tex. Cr. App. 1990).

cocaine was possessed by one or more of the three other occupants of the van. Therefore, the finding of Appellant's guilt beyond a reasonable doubt is not a rational finding. ***Carlsen,*** 654 S.W.2d at 449; ***see also, Guiton v. State,*** 742 S.W.2d 5, 9-10 (Tex. Cr. App. 1987).

We sustain Appellant's second point of error, reverse the judgment and order an acquittal.

/s/ Paul S. Colley
PAUL S. COLLEY
Justice

Opinion delivered October 30, 1992.
Tom B. Ramey, Jr., Chief Justice, concurring.

I concur in the results in this case. The majority was obligated under eminent precedents to so rule.

Perhaps the time is appropriate for the Legislature to consider an amendment to TEXAS HEALTH AND SAFETY CODE ANN. § 481.112(a), either to redefine possession of controlled substances or to alter the *mens rea* required to impose criminal responsibility without jeopardizing protection for the innocent. Certainly such an amendment could serve to eliminate the daunting task of gleaning circumstances and facts which are affirmative links between the accused and the contraband in cases involving significant quantities of drugs.

TOM B. RAMEY, JR.
Chief Justice
(PUBLISH)

I, Carolyn Allen, Clerk *of the Court of Appeals of the Twelfth Court of Appeals District of the State of Texas, hereby certify that the foregoing seven (7) pages contain a true and correct*

copy of the opinion filed in said court on the 30th day of October, 1992 in the following numbered and entitled cause:

WILLIE LEE DOUGLAS

No. 12-91-0057-CR ***vs.***

THE STATE OF TEXAS

on appeal to said court from Shelby County, Texas

WITNESS MY HAND
and the seal of said Court,
at Tyler, Texas

this the 23rd day of March, 1993.

/s/ Carolyn Allen
Carolyn Allen, Clerk

[SEAL]